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In the Supreme Court of the United States

October Term, 1969
No. ~~1188~~ 89

ALTON J. LEMON et al.,
Appellants

v.

DAVID H. KURTZMAN et al.,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

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On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO DISMISS OR AFFIRM

Appellees move that the present appeal be dismissed or that the final judgment of the District Court for the Eastern District of Pennsylvania in the present case be affirmed on the ground that the Federal Question presented is so unsubstantial as not to warrant argument thereon and further that the basic issues raised herein have been determined by this Court in its recent decisions.

QUESTIONS PRESENTED

Where the State of Pennsylvania enacted a statute authorizing state purchases of secular education services from qualified nonpublic schools, some of which may be sectarian institutions:

(1) Was the three-judge District Court below correct in finding that the statute on its face is constitutional as a matter of law and does not violate the establishment clause or free exercise clause of the First Amendment?

(2) Was the three-judge District Court below correct in refusing to consider conjectural allegations that the statute might be applied so as to violate the equal protection clause of the Fourteenth Amendment?

(3) Was the three-judge District Court below correct in granting Defendants' Motion To Dismiss in accordance with Rule 12(B)(6) of the Federal Rules of Civil Procedure as a matter of law because plaintiffs failed to state a claim upon which relief could be granted?

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania enacted in 1968 the Nonpublic Elementary and Secondary Education Act which authorizes the Secretary of Education to purchase secular educational services from nonpublic schools. The Act provides that any nonpublic school in which Pennsylvania residents may satisfy compulsory school attendance is eligible to contract with the Commonwealth to supply secular educational services.

As defined in the Act, secular educational service means the providing of instruction in a secular subject. Secular subject is defined to mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching or the morals or forms of worship of any sect.

The Commonwealth's purchase of services is restricted to certain secular subjects, namely, mathematics, modern foreign languages, physical science, and physical education. The Act authorizes the expenditure of funds only for teachers' salaries, textbooks, and instructional materials in the aforementioned courses. It requires approval by the Secretary of all textbooks and materials. Receipt of satisfactory services is measured by pupil performance on standardized tests. The Act also requires that the courses be taught by certified teachers.

Regulations enunciated by the Secretary of Education under authority of the Act require that nonpublic schools seeking to contract with the Commonwealth must set forth the subjects offered for instruction, the grade taught, the instructional classroom hours, and the number of pupils involved. They must also identify the teachers by name, state their qualifications and the percentage of the teachers' time and salary which would be allocated to the courses. The regulations require detailed information relating to textbooks, instructional materials, school accreditation, and the physical plant. This qualifying information is incorporated into the written agreement between the parties.

The consideration flowing to the Commonwealth in return for its expenditures is the implementation of its legislative obligation to maintain and improve secular education for all school-age children. The legislatively defined purpose of the Act is to promote the welfare of the people of Pennsylvania and the secular education of Commonwealth children attending nonpublic schools. More than twenty per cent of all Commonwealth children satisfy compulsory education requirements by attendance at nonpublic schools. The Act creates contractual relationships rather than subsidies, and when properly administered in accordance with its provisions is adequately safeguarded from unconstitutional administration.

Appellants ask that the statewide enforcement of the Act be enjoined by reason of its alleged unconstitutionality as violative of the First and Fourteenth Amendments of the United States Constitution. They

contend first that the Act violates the establishment clause of the First Amendment on the ground that receipt of public funds by sectarian institutions for any purpose is unconstitutional and that the use of public funds for such purpose unavoidably advances sectarian training.

Secondly, appellants contend the Act contravenes the equal protection clause of the Fourteenth Amendment by authorizing the use of public funds to encourage discrimination in schools. Appellants aver that there is a conjectural possibility that the Act might be applied in an unconstitutional manner, which requires a present declaration of general unconstitutionality.

The appellees-state officials moved to dismiss the complaint because the Act on its face is a constitutional exercise of the state's authority in conformity with the First Amendment. Furthermore, this patently valid exercise of the state's fundamental authority cannot be enjoined as unconstitutional because of speculative consequences, especially in view of the presumption of constitutional application by state officers.

The Court determined that the Pennsylvania Nonpublic Elementary and Secondary Education Act is not intended as an aid to religion, but that on the contrary it fulfills a lawful purpose, which may be lawfully implemented without violating the establishment clause of the First Amendment.

ARGUMENT

I. The Language of the Statute on Its Face Is Sufficiently Explicit To Establish Its Constitutionality Solely as a Matter of Law

Appellants, plaintiffs, below, requested a three-judge District Court for the Eastern District of Pennsylvania to declare unconstitutional a Pennsylvania statute, authorizing state purchases of secular education services from qualified schools, as repugnant to the First and Fourteenth Amendments to the United States Constitution. The Court below, after carefully reviewing the many opinions of this Court on the subject, found the state statute in question[1] to be constitutional as a matter of law.

In determining the issue, the court did not consider the motives of the Legislature; but instead, restricted its inquiry to the plain wording of the statute. This action was proper in view of the oft-cited principle that a court should not sit as a super-legislature to determine the wisdom, need, and propriety of legislation. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1954); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1936). "Inquiry into the hidden motives which

[1] The Nonpublic Elementary and Secondary Education Act, Act of June 19, 1968, P. L. —— (Act No. 109), 24 Purdon's Pennsylvania Statutes Annotated 5601 et seq. (pocket part).

may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts." *McGowen v. Maryland,* 366 U.S. 420, 425 (1960). Thus, when the plain meaning of a statute is clear, a court need not consider legislative intent as that intent might be embodied in legislative history.

The District Court also properly decided the constitutionality of the Act solely as a matter of law rather than considering whether the Act might be unconstitutionally applied in some isolated instances.[2] A three-judge District Court, convened in accordance with 28 U.S.C. 2281, 2284, should declare a state statute to be unconstitutional only when it has state-wide application and by its express terms or necessary operative effect violates the Federal Constitution. *Ex Parte Collins,* 277 U.S. 565 (1927); *Ex Parte Bransford,* 310 U.S. 354, 361 (1940); *Swift & Co. v. Wickham,* 382 U.S. 111, 128 (1965).

This requirement that a three-judge District Court should only consider questions of general constitutionality is based upon sound policy considerations. To avoid a serious drain upon the federal judicial system, principles of efficient operation dictate that all questions of possible unconstitutional applications of state statutes should be remanded to a single District Court judge. See generally *Phillips v. United States,* 312 U.S. 246 (1941); *Landry v. Daley,* 288 F. Supp. 194 (N.D. Ill. 1968), *appeal dismissed, Landry v. Boyle,* 393 U.S. 220 (1969). This is emphasized by

[2] Because no plaintiff had standing to challenge the Act on Equal Protection grounds, the court did not decide the Fourteenth Amendment issues raised by the plaintiffs.

considering the consequences of a contrary approach under this Act. Approximately twelve hundred schools have entered into contracts pursuant to this statute. The general constitutionality of a statute of this nature cannot be determined on the basis of its possible maladministration with respect to certain recipients. Thus, appellants in invoking the equal protection principle have requested a three-judge District Court to decide evidentiary questions which should be resolved by a single District Court judge.

II. The Decisions of This Court Support the Determination of the District Court That the Act Does Not Violate the First Amendment as a Matter of Law

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The District Court expressly considered "whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion." (Appendix to Appellants' Jurisdictional Statement at 12). The Court did not decide this question as an abstract matter. On the contrary, the court's opinion reflects the extensive review of pertinent Supreme Court cases relating to the First Amendment. On the basis of their exhaustive study, the court concluded that as a matter of law the Pennsylvania Education Act does not violate the First Amendment. The appellees-state officials therefore submit that the First Amendment arguments raised by Appellants in their Jurisdictional Statement are so unsubstantial as not to warrant further argument.

The court concluded that because of the narrowly proscribed purposes for which the public funds could be used,[3] the purpose and primary effect of this Act is to aid the secular function of private schools. Accordingly, the Pennsylvania Education Act on its face conforms in all respects with the tests formulated by this Court in *Everson v. Board of Education,* 330 U.S. 1 (1947); and *Board of Education v. Allen,* 392 U.S. 236 (1968).

A comparison of the Pennsylvania Public Education Act with the statute in *Allen v. Board of Education,* supra, convincingly demonstrates that the purpose and effect of both acts are substantially similar. In *Allen,* this Court held that a New York statute authorizing loans of textbooks to students attending parochial schools was not violative of the establishment clause of the First Amendment. Despite the fact that public funds were irrevocably committed in providing the tools of education for parochial schools, this Court found, "that the processes of secular and religious training are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion". *Allen,* supra at 248. Although public funds are also irrevocably committed to parochial schools pursuant to the Pennsylvania Education Act, expenditures under the act serve the same secular purpose as those in *Allen* by providing textbooks, teachers' salaries and in-

[3] The Education Act authorizes the Commonwealth to contract only for services connected with the function of educating Pennsylvania's school children in the secular subjects of mathematics, physical sciences, modern foreign languages, and physical education.

instructional materials in the secular subjects of mathematics, physical sciences, modern foreign languages, and physical education. The significant fact in both cases is that public funds are being used solely for the purpose of providing secular educational services to nonpublic schools.

Although no one can seriously dispute that the Establishment Clause prohibits the states from setting up a church or supporting the religious activities of sectarian institutions, it has been conclusively determined that a state may not exclude religions from the benefits of public welfare legislation and must be neutral in its relations with groups of religious believers and nonbelievers. *Everson*, supra at 15-18. Moreover, in ascertaining neutrality, the test of this Court is:

> ". . . what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School District v. Schempp*, 374 U.S. 203, 222 (1962).

In applying that test to the instant case, the District Court concluded that the purpose and primary effect of the Pennsylvania Education Act is secular and that any incidental benefit to religion is "not sufficient to infringe upon the nonestablishment prin-

ciple of the First Amendment." (Appendix to Appellants' Jurisdictional Statement at 21.)

Moreover, "the fact that a State law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say that a Legislature has erroneously appraised the public need." *Everson,* supra at 6. Thus, "a state may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment." (Appendix to Appellants' Jurisdictional Statement at 17.)

The Pennsylvania Legislature, in its wisdom, has determined that this Act will better provide for the secular education of Pennsylvania's children in nonpublic schools. This goal is consistent with the pronouncement in *Allen v. State Board of Education,* 392 U.S. 236, 247 (1968) that: ". . . private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . parochial schools are performing, in addition to their sectarian function, the task of secular education."

Having decided that the purpose and primary effect of the Act is secular and does not advance or support religion, the court below necessarily held that the plaintiffs' challenge based upon the Free Exercise Clause of the First Amendment was without substance. As a matter of law, the plaintiffs have failed to show "the coercive effect of the enactment

as it operates against them in the practice of their religion". See *Abington School District v. Schempp*, supra, at 223 (1963).

In view of the thorough examination of the First Amendment issue below, it is apparent that no further argument is necessary. A reading of the lengthy and well-reasoned opinion of the District Court clearly demonstrates that appellants' allegation that the Pennsylvania Education Act violates the First Amendment to the United States Constitution is wholly without merit.

III. The General Constitutionality of a Statute Cannot Be Determined on the Basis of Its Speculative Impact Upon Certain Parties

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In addition to their challenge to the Pennsylvania Education Act on First Amendment grounds, the appellants contend that the Act violates the equal protection clause of the Fourteenth Amendment.

The District Court properly ruled that none of the plaintiffs (appellants herein) proved the requisite standing as that concept is interpreted in *Flast v. Cohen*, 392 U.S. 83 (1968). Because no appellant ever alleged that he was personally affected "by any alleged intentional or de facto segregation in these schools", the District Court summarily declined to decide the Fourteenth Amendment issue. "Standing requires at least that the plaintiff himself be personally affected." (Appendix to Appellants' Jurisdic-

tional Statement at 10, 11, citing *Flast v. Cohen,* supra at p. 110, and *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). Nevertheless, despite the absence of a proper plaintiff below, the appellants persist in raising their Fourteenth Amendment challenge here.

Even if this Court were to consider that issue, the pleadings compel the conclusion that this statute on its face does not violate the equal protection clause. In the first place, every state statute carries with it a presumption of constitutionality. *Salsburg v. State of Maryland,* 346 U.S. 545 (1954); *Atchison, T. & S. F. R. Co. v. Matthews,* 174 U.S. 96 (1899). Moreover, it must be assumed that the Commonwealth grounded its law on some rational basis within the knowledge and experience of legislators, even though some discrimination could eventually flow therefrom. *Metropolitan Casualty Insurance Co. of New York v. Brownell,* 294 U.S. 580 (1935). Thus, "state legislators are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it". *McGowan v. Maryland,* 366 U.S. 420, 425 (1960). It is further presumed that the public officials charged with administering a state statute are acting properly and applying the law in a constitutional manner. *United States v. Chemical Foundation,* 272 U.S. 1 (1926).

A reading of this statute demonstrates that the Pennsylvania Legislature has acted within its constitutional limitations There is no basis for even an inference that, as a matter of law, the Act excludes

from admission or otherwise discriminates against persons by reason of race. By adding the Fourteenth Amendment issue to the First Amendment challenge, the appellants are asking the Court to speculate that the Act might some day produce some form of discrimination. But the basic issue for adjudication is not whether the Act might be administered in an unconstitutional manner because the possibility or probability of such maladministration cannot nullify a statute. Otherwise, no statute could ever withstand a constitutional challenge on equal protection grounds.

CONCLUSION

Appellees respectfully submit that the issues upon which this cause depend are so unsubstantial as not to warrant further argument. Appellees therefore respectfully move the Court to dismiss this Appeal or to affirm the judgment entered in the cause by the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

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